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In the

Supreme Court of the United States

OCTOBER TERM, 1967

LINCOLN MANUFACTURING CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on July 7, 1967. The judgment sought to be reviewed enforced an order against Petitioner by the National Labor Relations Board.

OPINION BELOW

The opinion of the Court of Appeals is not officially reported. This opinion is reproduced in Appendix A, *infra,* pp. 1a-7a.

JURISDICTION

The judgment of the Court of Appeals was made and entered on July 7, 1967. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTION PRESENTED

In determining the validity of union authorization cards, is the appropriate test the understanding and intent of the employee resulting from all representations made by Union representatives, or is the absence of a representation that the card is to be used *solely* for the purpose of obtaining an election conclusive?

STATUTE INVOLVED

The statutory provision involved is Section 8 (a) (5) of the National Labor Relations Act, as amended, 29 U.S.C. §158 (a)(5), reproduced in Appendix B, *infra*, p. 8a.

PROCEEDINGS BELOW

This case stems from charges of unfair labor practices filed against Petitioner alleging violations of §§8(a)(5) and (1) of the National Labor Relations Act in that Petitioner refused to bargain with Local Union No. 503, Sheet Metal Workers' International Association, AFL-CIO (herein sometimes called the "Union"), and had also violated §8(a)(1) by interference with and restraint and coercion of its employees. The National Labor Relations Board affirmed the order and findings of its Trial Examiner which required Petitioner to recognize and bargain with the Union and to cease and desist from violations of §8(a)(1). The Court of Appeals affirmed, Judge Schnackenberg dissenting.

STATEMENT OF THE CASE

By letter dated May 13, 1965 (a Thursday) the Union wrote to Petitioner as follows:

> "Request is hereby made that Lincoln Manufacturing Co. Inc. recognize and bargain with Sheet Metal Workers' International Association, Local #503 for a collective bargaining agreement, covering Production, Maintenance, Shipping and Receiving, Truck Drivers and Janitorial employees of your Company for wages, hours of work, and other working conditions of the above-mentioned employees." (Gen. Coun. Exh. No. 2, JA 173).

The record does not disclose the date or time of mailing but reveals that the letter was received by Petitioner on Monday, May 17, after Petitioner's president had received a telephone call from the Regional Office of the National Labor Relations Board advising him that the Union had already filed a representation petition seeking an election among the class of employees designated in the above letter and inquiring as to whether Petitioner would agree to an election. The Petitioner agreed. The Union made no claim to majority representation in its letter and made no further demands to bargain upon Petitioner.

At the election 27 of 28 eligible voters cast ballots, 11 in favor of and 16 against the Union. The Union filed charges of unfair labor practices in violation of §§8(a)(1) and 8(a)(5) of the National Labor Relations Act.

At the hearing General Counsel introduced authorization cards from 21 of Petitioner's employees (Gen. Coun. Exhs. Nos. 17 through 25 and 27 through 38). This was Petitioner's first knowledge the Union held such cards from any of its employees. Petitioner objected to the

introduction of 10 such cards because of representations made to the employees by the Union solicitors at the time that their signatures were secured that they were to be used to obtain an election.

The Board held and the Seventh Circuit affirmed its holding that all the cards were validly secured, that on May 17, 1965 a majority of the employees in the unit had authorized the Union to act as their collective bargaining representative, and that Petitioner had violated §§8(a)(1) and (5) of the National Labor Relations Act.

REASON FOR GRANTING THE WRIT

The Decision of the Court of Appeals in the Instant Case Conflicts Directly With the Decision of the Court of Appeals for the Second Circuit in NLRB v. S. E. Nichols Co., ... F. 2d ...., 65 LRRM 2655, 55 LC §12,016 (2nd Cir. 1967) and the Decision of the Court of Appeals for the Fifth Circuit in Engineers and Fabricators, Inc. v. NLRB, 376 F. 2d 482 (5th Cir. 1967).

The conflict between the decision in this case and the decision of other Circuits has been expressed by the Second Circuit in the *NLRB* v. *S. E. Nichols Co.,* ..... F. 2d ....., 65 LRRM 2655, 55 LC §12,016 (2nd Cir. 1967) case as follows:

> "There is some disagreement among the courts of appeals as to the effect of union tactics of the sort here described. [Statements by solictors which cause employees to believe the union would not achieve representation status without an election.] . . . The disagreement concerns the extent to which the Board may consider the authorization printed on the card, often in legal language employees cannot understand, to be nearly conclusive evidence of the signers' intent

> in the face of oral representations that the purpose of the card is to secure an election. The Sixth and Seventh Circuits have followed the Board's position that authorization cards which in terms confer bargaining authority can be invalidated only by proof that signatures were obtained by a misrepresentation that the *sole* purpose of the cards was to obtain an election. . .. The Fifth Circuit and, as that Circuit reads its opinion, the Eighth hold such cards invalid if the employees were led to believe that the union would attain representative status *only* by winning an election even though they were also told the cards might be shown to the employer, *Engineers & Fabricators, Inc.* v. *NLRB,* 376 F. 2d 482 (5 Cir. 1967); *Bauer Welding & Metal Fabricators, Inc.* v. *NLRB,* 358 F. 2d 766 (8 Cir. 1966) . . ." ..... F.2d at ..... 65 LRRM at 2659. (Italics ours).

In the instant case the Trial Examiner resolved a conflict in testimony between the Union solictors and the signers of three contested cards by accepting the testimony of the Union representatives and discrediting that of the employees. However, as to 7 cards, which if invalid would deny the Union majority status and hence make the bargaining order improper,[1] the Examiner did not discredit the testimony of the employees that they signed the cards because they were told that they were being secured "to get an election." Rather, he held, and the Board adopted his findings that the 7 cards were valid because the employees were not told their *sole* purpose was to obtain an election.

---

[1] The unit consisted of 29 employees and 15 cards were required for a majority. The elimination of 7 cards introduced at the hearing would leave the Union with 14 valid cards.

The Court of Appeals affirmed[2] since it has accepted the Board's view that the authorization cards are not merely the beginning but they are the end of the inquiry unless there be proof that an employee was told that they were to be used *solely* for the purpose of obtaining an election. *NLRB* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, (6th Cir. 1965); *Happach* v. *NLRB*, 353 F. 2d 629 (7th Cir. 1965). "The decisive question is whether the employees 'meant to make the Union their representative' or instead 'understood the cards not to be votes for the Union' but rather requests 'that an election should be called at which they would vote for or against the Union as they then pleased.'" *NLRB* v. *Stow Mfg. Co.*, 217 F. 2d 900, 902 (2 Cir. 1954) (L. Hand, J.), cert. denied, 348 U.S. 964 (1955). ..... F. 2d at ..... 65 LRRM at 2659.

An inquiry that falls short of reaching a determination as to whether the employee, by signing the card, intended to make the Union his representative or was led to believe the card was to be used to obtain an election and limits itself only to the question of whether or not the employee was told the purpose of the card was *solely* to obtain an election, hardly promotes the purposes of the National Labor Relations Act or serves to protect the employee's right under §7 of that Act to join or not to join a Union.

---

[2] The Court's opinion erroneously states that the Trial Examiner resolved issues of credibility and inconsistencies in the testimony as to these 7 cards. In fact, the cards were held valid simply because no representation was made that they were for the *sole* purpose of obtaining an election. The relevant portions of the Trial Examiner's opinion appear on the following pages of the Joint Appendix: Garcia, JA 22; Pion, JA 23; Fowler, JA 23; Cooper, JA 24; W. Peters, E. Peters, and Towler, JA 26.

The Second and Fifth Circuits have rejected such a lesser inquiry and have placed themselves in the shoes of the employee. They regard the employee's intent, his understanding of his own acts, not the mere language printed on the card, as the controlling factor in determining the validity of the cards. The language on the cards they hold is the beginning not the end of the inquiry, the Court in *S. E. Nichols Co.* pointing out:

> "It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality." ..... F. 2d at ..... 65 LRRM at 2658.

As noted in the Yale Law Journal which the court in the *S. E. Nichols Co.* case quotes approvingly:

> "If the employee thinks the cards will lead him to a secret ballot, he can insure himself against the possibility of future retaliation and prevent harassment only by signing. Such an employee may sign a card planning to vote against the Union or at least intending to reserve decision until he hears the employer's views or talks to fellow employees." *Union Authorization Cards,* 75 Yale L. J. 805, 826, 65 LRRM at 2660.

Thus there is a conflict between the Circuits as to the proper scope of the inquiry into the validity of union authorization cards. This is a question which has not been but should be decided by this Court because of its importance in effectuating the purposes of the National Labor Relations Act and in protecting the basic rights of

the employees to join or not to join a union. Where an employee has not been clearly shown to have chosen to be represented by a union, union representation should not be foisted upon him. The decision in *S. E. Nichols Co.* which substitutes fact for form and gives recognition to union methods of organizing and lack of sophistication on the part of employees represents the more appropriate rule and one which will promote the purposes of the Act and protect the rights of the public and the parties. The view of the Board and of the 7th Circuit we submit is erroneous, and the order to bargain with a union which has not established majority representation is improper.

CONCLUSION

For the above reasons Petitioner requests that this Petition be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1966—APRIL. SESSION, 1967

No. 15914

LINCOLN MANUFACTURING CO., INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review and Set Aside and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

July 7, 1967

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

KNOCH, *Circuit Judge.* The petitioner, Lincoln Manufacturing Company, Inc., hereinafter called "Lincoln," pursuant to §10(f) of the National Labor Relations Act, as amended, Title 29 U.S.C. §151, et seq., §160(f), seeks to set aside an Order of the National Labor Relations Board issued October 12, 1966, reported at 160 NLRB No. 146, 1966 CCH NLRB ¶20,784, p. 26,744. The Board has cross-petitioned under §10(e) of the Act for enforcement of its Order to cease and desist from unfair labor practices or other infringement on employees' rights, to bargain collectively with Local Union 503, Sheet Metal Workers' International Association, AFL-CIO (hereinafter called the "Union") on request, and to post appropriate notices.

The Board found that Lincoln violated §8(a)(5) and (1) of the Act by refusing to bargain with the Union, and had independently violated §8(a)(1) by acts of interference, restraint and coercion to undermine the Union, dissipate its majority status and avoid the duty to bargain.

Union organizer Frank Elbrink testified that, after he had addressed a meeting of 22 Lincoln employees late in March, 1965, on the benefits of union representation, explaining that the Union as employee representative could negotiate for a contract with Lincoln on wages, seniority, job security, holidays, vacations, etc., the employees present unanimously voted to be represented by the Union. He said he told the employees of his then opinion that Lincoln's President D. Dean Rhoads would recognize the Union without an election.

Under date of May 13, 1965, on the basis of authorization cards from 21 of the 29 employees in the unit, Mr. Elbrink wrote Lincoln defining the unit and asking for recognition and bargaining. Lincoln stipulated that this letter was received on or about May 17, 1965, the same day the Union filed a Representation Petition seeking an election.

A consent election was held on July 8, 1965, at which 11 of the 28 then eligibles voted for and 16 against the Union. One employee did not vote.

On the basis of the Union's objections, the Board set this election aside.

The cards signed by the 21 employees read:

> AUTHORIZATION FOR REPRESENTATION
>
> I, the undersigned, hereby authorize the SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, or any affiliated Local Union thereof, to represent me for purposes of Collective Bargaining, and in my behalf, to, negotiate and conclude all agreements as to hours of labor, wages, and other conditions of employment.

After hearing testimony as to the statements made in connection with the cards, the Trial Examiner found no support for Lincoln's objections that 11 of the cards

were signed on representations that despite the clear wording of the card its sole purpose was to secure an election. There were some conflicts and inconsistencies in the testimony of the various witnesses. Granting that resolution of certain issues of credibility had to be made by the Trial Examiner who heard the witnesses, we agree that the record supports his conclusion, as affirmed by the Board, that on May 17, 1965, when Lincoln received the Union's request for recognition, a majority of the employees in the unit had authorized the Union to act as their collective bargaining representative.

Lincoln argues that the May 13, 1965, letter was defective in that it made no claim to majority status. The letter read:

(Letterhead of)
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION

May 13, 1965

Mr. D. Dean Rhoads, President
Lincoln Manufacturing Co., Inc.
P. O. Box #1229
Ft. Wayne, Indiana 46808

Dear Mr. Rhoads:

Request is hereby made that Lincoln Manufacturing Co., Inc. recognize and bargain with Sheet Metal Workers' International Association, Local #503 for a collective bargaining agreement, covering Production, Maintenance, Shipping and Receiving, Truck Drivers and Janitorial employees of your Company for wages, hours of work, and other working conditions of the above-mentioned employees.

I should be most glad to meet with you to discuss this matter at your convenience. I can be reached at the above address.

Awaiting your reply, I remain,

Yours truly,
/s/ Frank Elbrink
International Organizer

FE:jo
Certified Mail

Unlike the communication in Sheboygan Sausage Co., Inc., 156 NLRB #130, p. 1490 (1966), on which Lincoln relies, the letter did request bargaining, contained the Union's name and address so that a reply could have been made, and described the bargaining unit. As the Trial Examiner concluded, a claim to majority status was inherent in the explicit request for recognition and bargaining. Even in Sheboygan, it was noted (p. 1501) that the mere filing of an election petition did not bar the operative effect of a simultaneous demand for recognition and bargaining and that in other contexts a claim to represent employees might reasonably be understood as a claim to majority representation.

On or about the same day that Lincoln agreed orally to a consent election, May 20, 1965, it mailed announcements of its 1965 vacation plans to the employees, in disregard of the policies and rules set out in Lincoln's "Handbook" which had been distributed to all employees, under which none of the employees would have been entitled to a vacation in 1965. Each employee was told how many days of paid vacation he was entitled to receive and asked to indicate the days he desired to take. Some employees were offered the choice of working on vacation days to receive additional wages. One such letter read:

(Letterhead of)
LINCOLN MANUFACTURING CO. INC.

May 20, 1965

Mr. Wayne L. Long
2518 Warsaw St.
Fort Wayne, Ind.

Dear Wayne,

This is to keep my promise to let you know the details of our vacation plans for this summer. It is difficult to set a date that will suit each family . . . but, this year we are going to see how it works out to close the plant during the school vacation period to benefit our co-workers with children in school.

We have chosen to close the plant and office for vacation the week of June 28th through July 5th; since July 5th is a holiday, this will give you more time off.

Our records show that you are entitled to 4 working days off at full pay in addition to July 5th.

We will keep a skeleton crew working the entire week of June 28th at regular pay for the benefit of the co-workers who are not entitled to a full weeks' vacation. You may work the days you are entitled to vacation if you apply and receive advance approval from Leonard. If so, you will receive a pay check for the vacation days plus regular time for the hours you work. If you have any questions concerning this, please ask Leonard, and we will get an immediate answer for you.

Your vacation pay check will be distributed on June 25th.

If this vacation plan works out well, perhaps we can, without setting a precedent this year, do the same next year.

Please fill out the form attached and place it in the suggestion box as soon as you decide on the days you wish to vacation during that week.

My best wishes to you and your family for a pleasant and restful vacation.

Very sincerely yours,
/s/ Dean Rhoads
President

Enclosure

President Rhoads testified that the plan to provide vacations for 1965 was the subject of consideration initiated in January or February, 1965, with a view to preserving good company-employee relations, but that the plans were announced only when completely formulated in mid-May, 1965. Perhaps the unfortunate timing was mere coincidence. The Board, however, was adversely influenced by Lincoln's withholding, for three months, the announcement of a policy allegedly changed early in the year to maintain good employee relations, and by the fact that at least one management official was apparently unaware of this change in policy as late as May 14, 1965. Lincoln argues that there is no evidence that it tried to capitalize on this change in policy, but we must agree with the Board that, whenever the policy change was formulated, the timing of the announcement

and the conferring of an economic benefit on the employees during the week before the election were calculated to influence its outcome. *N.L.R.B.* v. *Exchange Parts Co.*, 1964, 375 U. S. 405, 409; *Browning Industries, Inc.*, 1963, 142 N.L.R.B. 1397, 1401. The Board was justified in holding that this action constituted interference with the rights of the employees under §7, and therefore violated §8(a)(1) of the Act.

It is sometimes difficult to draw the line between vigorous oral and written presentation of a company's position and veiled threats of economic reprisal. The three letters sent by President Rhoads and his address to the employees on the day before the election, when viewed as a whole, are susceptible of the interpretation made by the Board: that they contain implicit threats of loss of benefits and economic reprisals. *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, 7 Cir., 1963, 327 F. 2d 109, 111, cert. den. 377 U.S. 944.

The letters and the speech do support the conclusion drawn by the Board that Union success in the election would spell the end of currently enjoyed overtime for the employees and that President Rhoads would refuse to enter into a particular government contract if the Union were brought into the plant—threats calculated to dissipate the Union's majority status.

There was a conflict in the testimony as to the statements made by President Rhoads when he took pictures of two of the employees who were distributing Union handbills on the highway near Lincoln's entrance after work on July 6th. The Trial Examiner credited the statements of the two employees that Mr. Rhoads said he could have them fired for what they were doing, rather than Mr. Rhoads' own testimony that the men agreed to have their pictures taken and that there was no further conversation, or that one of them had asked if Mr. Rhoads would fire them, but that he had not replied to the question.

This Court will rarely disturb determinations on issues of credibility made by the Trial Examiner and the Board. *N.L.R.B.* v. *Marsh Supermarkets, supra*, 112; *Sunshine Biscuits, Inc.* v. *N.L.R.B.*, 7 Cir., 1960, 274 F. 2d 738, 741.

If this Court were considering this matter de novo, we might arrive at a contrary conclusion, but we are not at liberty to consider the matter de novo. The issue before us is whether substantial evidence on the record considered as a whole supports the Board's findings.

We find substantial evidence on the record as a whole to support the Board's findings that Lincoln engaged in coercive conduct in violation of §8(a)(1) and §8(a)(5) of the Act. The remedies prescribed are appropriate. *N.L.R.B.* v. *Storack Corp.*, 7 Cir., 1966, 357 F. 2d 893, 895, 897.

The petition for review is denied. Enforcement of the Board's Order is granted.

PETITION FOR REVIEW DENIED;
ENFORCEMENT GRANTED.

No. 15914

SCHNACKENBERG, *Circuit Judge*, dissenting.

From an examination of the record in this case I am convinced that the petitioner is justified in contending that the order of the Board should be set aside.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Section 8(a)(5) of The National Labor Relations Act provides as follows:

"Sec. 8 (a) It shall be an unfair labor practice for an employer—

• • •

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."